

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

WILLY CARL LYONS,

Petitioner,

No. CIV S-96-0784 GEB GGH P

vs.

THEO WHITE,

Respondent.

ORDER &

FINDINGS AND RECOMMENDATIONS

_____ /
This petition for writ of habeas corpus was denied on February 28, 2001, and judgment entered accordingly. More than five years later, on August 10, 2006, petitioner pro se purports to bring a motion for relief from judgment under Fed. R. Civ. P. 60(b)(6),¹ as well as a

¹ Rule 60(b) provides in relevant part: "On motion and upon such terms as are just, the court may relieve a party ... from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud ..., misrepresentation, or misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken."

1 motion for appointment of counsel, all of which he has included in a motion captioned “motion
2 for appointment of counsel.”

3 Petitioner asks the court to determine whether this court’s dismissal of claims 1, 2,
4 5, 6, and 7 from the second amended petition, pursuant to the application of the AEDPA, resulted
5 in the continued confinement of petitioner, who is actually innocent, amounting to a
6 fundamental miscarriage of justice. Motion, pp. 6, 10. Petitioner asks the court to determine
7 whether there were extraordinary circumstances beyond petitioner’s control, making it
8 impossible for petitioner to comply with the AEDPA statute of limitations. Id.

9 In addition, petitioner asks the court to reconsider its denial of petitioner’s
10 vindictive prosecution claim. Id. Petitioner expressly contends that he is not bringing a
11 successive petition and that the motion should be construed as made only pursuant to Rule 60(b),
12 explicitly Rule 60(b)(6). Motion, p. 7.

13 Under Rule 60(b), a party may seek relief from judgment and to re-open his case
14 in limited circumstances, “including fraud, mistake, and newly discovered evidence.” Gonzalez
15 v. Crosby, 545 U.S. 524, 528, 125 S. Ct. 2641, 2645-46 (2005). Under Rule 60(b)(6), the
16 catchall avenue by which petitioner seeks to proceed to reopen his case, one must demonstrate
17 “any... reason justifying relief from the operation of the judgment” in situations that are not
18 addressed by the specific circumstances delineated in Rule 60(b)(1)-(5). Gonzalez v. Crosby,
19 545 U.S. 524, 528-529, 125 S. Ct. 2641, 2646 (2005).

20 A purported Rule 60(b) motion in the context of a habeas petition pursuant to 28
21 U.S.C. § 2254 is in essence a successive petition, under 28 U.S.C. § 2244(b) where it “seeks to
22 add a new ground for relief,” or “if it attacks the federal court’s previous resolution of a claim *on*
23 *the merits...*” Gonzalez, at 532, 125 S. Ct. at 2648 [emphasis in original]. “[A] ‘claim’ as used
24 in § 2244(b) is an asserted federal basis for relief from a state court’s judgment of conviction.”
25 Id., at 530, 125 S. Ct. at 2647. For purposes of this analysis, the United States Supreme Court
26 has said, that “on the merits” applies when a movant asserts a ground under 28 U. S.C. § 2254 (a)

1 and (d) or that a prior ruling on one of those grounds was made in error, and that such a movant
2 “is making a habeas corpus claim.” Gonzalez, at 532 n. 4, 125 S. Ct. at 2648 n. 4.

3 In this case, the petition was denied on the merits. One of the specific grounds
4 that was reached was “whether the prosecution engaged in vindictive prosecution by charging
5 more serious offenses when petitioner refused a two-year offer and demanded his constitutional
6 right to a preliminary hearing.” Findings and Recommendations, pp. 2, 22-26, filed on January
7 26, 2001, adopted by Order, filed on February 2, 2001. Petitioner’s motion for this court to re-
8 visit its ruling denying petitioner’s vindictive prosecution claim plainly constitutes a second or
9 successive petition and must be dismissed. Petitioner must seek permission from the Ninth
10 Circuit before he may proceed upon any such claim.

11 A motion may proceed under Rule 60(b), “when neither the motion nor the federal
12 judgment from which it seeks relief substantively addresses the federal grounds for setting aside
13 the movant’s state conviction...” Gonzalez, at 532, 125 S. Ct. at 2648. Thus, a motion
14 challenging only the federal court’s prior judgment as a misapplication of the federal statute of
15 limitations under § 2244(d) is not a successive petition. Gonzalez, at 535, 125 S. Ct. at 2650.
16 Thus, the Ninth Circuit has recently held:

17 where...the district court dismisses the petition for failure to pay
18 the filing fee or to comply with the court’s orders, the district court
19 does not thereby reach the “merits” of the claims presented in the
petition and a Rule 60(b) motion challenging the dismissal is not
treated as a second or successive petition.

20 Butz v. Mendoza-Powers, 474 F.3d 1193, 1194 (9th Cir. 2007).

21 As to petitioner’s request that the court reconsider its dismissal of Claims 1, 2, 5,
22 6, and 7 from the second amended petition, pursuant to the application of the AEDPA, the court
23 first notes that petitioner, who was represented by counsel, was granted a certificate of
24 appealability by the district court on the following claims:

25 whether petitioner’s claims should relate back to his pre-AEDPA
26 habeas petition; whether the district court should have denied
petitioner leave to amend as to claims 1, 2, 5, 6 and 7 of the second

amended petition²; whether the district court properly applied the federal habeas corpus statute of limitations as to claims 1, 2, 5, 6 and 7 of the second amended petition; whether the district court should have allowed equitable tolling as to the limitations period for claims 1, 2, 5, 6 and 7 of the second amended petition; whether the jury returned a guilty verdict on three counts for which no evidence was introduced; whether the jury improperly returned a general verdict finding petitioner guilty of using a dangerous weapon razor blade to inflict great bodily injury on eleven sex-related counts; whether the prosecution engaged in vindictive prosecution by charging more serious offenses when petitioner refused a two-year offer and demanded a preliminary hearing; whether the trial court allowed inadmissible expert testimony regarding victims' state of mind in a hostage situation; whether petitioner was denied effective assistance of counsel when the court did not substitute another attorney for his court-appointed counsel; whether petitioner was denied his right to trial by twelve impartial jurors when certain members of the jury witnessed an outburst by a prosecution witness outside the courtroom; whether an erroneous jury instruction was given regarding a lesser included offense charge and whether this resulted in denial of petitioner's right to a fair trial; whether petitioner's due process and double jeopardy rights were violated by the imposition of multiple enhancements for two discrete acts.

Order, filed on April 4, 2001.

The docket of this case indicates that the Ninth Circuit affirmed the decision of the district court by an order filed in this court on May 31, 2002, a fact which petitioner expressly concedes in his motion, wherein petitioner states that the Ninth Circuit affirmed the district court's judgment denying the petition on April 2, 2002, and thereafter, denied petitioner's request for a rehearing en banc, on May 13, 2002; on August 8, 2002, his petition for writ of certiorari to the United States Supreme Court was denied. Motion, p. 8. Thus, petitioner seeks to re-open a

² 1) Denial of due process under Fifth and Fourteenth Amendment, and right to a fair trial under Sixth and Fourteenth Amendment, by prosecutor's improper vouching for the credibility of the key witness. ... 2) Denial of due process under Fifth and Fourteenth Amendment, right to fair trial under Sixth and Fourteenth Amendment, and right to confront adverse evidence under Sixth and Fourteenth Amendment by prosecutor's repeated violation of the advocate-witness rule. ... 5) Denial of due process under Fifth and Fourteenth Amendment when the prosecutor made several objectionable statements during closing argument. ... 6) Ineffective assistance of trial counsel in violation of the Sixth and Fourteenth Amendment.... 7) Ineffective assistance of appellate counsel in violation of the Sixth and Fourteenth Amendment. ... See Magistrate Judge's Order of August 11, 1999.

1 claim, which has, inter alia, been previously adjudicated by the Ninth Circuit, claiming “actual
2 innocence.” Moreover, in dismissing Claims 1, 2, 5, 6, and 7 as barred by the statute of
3 limitations under AEDPA for failure to relate back under Rule 15(c) of the Federal Rules of Civil
4 Procedure, this court noted that “Claims 3 and 4, the claims which this court will allow to go
5 forward, are the claims that implicate actual innocence with respect to some of the counts upon
6 which petitioner was found guilty. The claims that are barred by the statute of limitations do not
7 implicate actual innocence.” Order, filed on August 11, 1999, p. 14.

8 While motions based on Rule 60(b) (1)-(3), “must be made ‘within a reasonable
9 time’ and ‘not more than one year after the judgment, order, or proceeding was entered or taken,’
10 Fed. R. Civ. P. 60(b), motions based on other reasons, including on ‘any other reason justifying
11 relief from the operation of the judgment,’ Fed. R. Civ. P. 60(b)(6), must be made ‘within a
12 reasonable time,’ Fed. R. Civ. P. 60(b).” Butz v. Mendoza-Powers, 474 F.3d at 1195.³ Even
13 assuming petitioner filed this motion within a reasonable time, which on the face of it, he has
14 not, having given no adequate explanation for the five-year delay in filing the motion, under Rule
15 60(b)(6), a petitioner must show “extraordinary circumstances” to justify reopening the case.
16 Gonzalez, at 535, 125 S. Ct. at 2649, citing, inter alia, Ackermann v. United States, 340 U.S.
17 193, 199, 71 S. Ct. 207 (1950).

18 To the extent that this petition might not be deemed successive on this motion
19 with regard to dismissal of Claims 1, 2, 5, 6, and 7 from the second amended petition, petitioner
20 demonstrates neither “extraordinary circumstances” nor, as noted, has he made this motion
21 “within a reasonable time.” Petitioner does not raise any argument in his motion premised on a
22 factual or legal basis which has either not been raised previously or which would not have been
23 available to him or his counsel at the time when his application was before this court. Petitioner
24

25 ³ The Ninth Circuit left it to the district court to determine the “timeliness and merits” of
26 petitioner’s Rule 60(b) motion, where petitioner filed his motion six years after the judgment,
challenging the district court’s dismissal of his petition for failure to pay the filing fee or to
comply with court orders. Butz, supra, at 1194, 1196.

1 claims that he began being treated with psychiatric medications in 1990, that he was diagnosed as
2 suffering from a major mental illness requiring his placement in CCCMS, that by 1995 he was
3 prescribed antipsychotic medication as well as medication for depression. Petitioner submits
4 exhibits indicating that he received mental health treatment and received psychotropic
5 medication. He contends that he was subject to depression and that he was placed in the
6 Enhanced Outpatient Program (EOP) in 2001, following several suicide attempts. He states that
7 he has suffered from a major psychotic disorder for the entirety of his imprisonment and that he
8 had difficulty locating the assistance of a jailhouse lawyer due to the nature of his conviction,
9 involving sexually assaulting a fifteen-year old girl. Motion, pp., 13-21, & Exhibits 6-14. He
10 also claims that prison officials failed to protect him after he cooperated with them and that the
11 federal defender failed to review his entire file in a timely fashion. Motion, pp. 22-25, &
12 Exhibits 16-17.

13 He does not deny the acts relating to, or his responsibility for, the horrific events
14 of August 1, 1988, but seeks to attack the credibility of the victim/chief witness relating to the
15 counts upon which petitioner was convicted of having committed unlawful sexual acts and
16 forcible sex offenses with a minor for which, inter alia, petitioner received a sentence of 216
17 years with a consecutive life sentence. Motion, pp. 6-12.

18 Nothing in the record to which petitioner cites was not available to him or his
19 counsel previously. His argument relating to the deficiencies of the federal defender's
20 representation have been previously considered and ruled on by the court. Much of what
21 petitioner argues does not have particular relevance; for example, petitioner's habeas application
22 proceeded with the federal defender representing him; therefore, the state of his mental health
23 does not appear particularly relevant. Nor does petitioner explain his inordinate delay in
24 proceeding upon this motion when nothing to which he cites is newly discovered and was not in
25 the record of the case to which he had access earlier.

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1 To the extent that this motion “challenges only the District Court’s failure to reach
2 the merits” and “can therefore be ruled upon by the District Court without precertification by the
3 Court of Appeals pursuant to § 2244(b)(3),” Gonzalez, supra, at 538, 125 S. Ct. at 2651, this is a
4 case, like Gonzalez, wherein petitioner fails to set forth the requisite “extraordinary
5 circumstance” justifying relief.

6 Petitioner seeks appointment of counsel for claims that are not colorable, either
7 because petitioner attempts to proceed on a successive petition, absent having been certified to do
8 so by the Ninth Circuit, or because he does not make the “reasonable time” or “extraordinary
9 circumstance” showing that is required pursuant to Fed. R. Civ. P. 60(b)(6).

10 Accordingly, IT IS ORDERED that petitioner’s August 10, 2006, motion for
11 appointment of counsel is denied.

12 IT IS HEREBY RECOMMENDED that petitioner’s motion for relief from
13 judgment, pursuant to Fed. R. Civ. P. 60(b)(6), filed on August 10, 2006, be DISMISSED to the
14 extent that it is a successive petition, and DENIED to the extent that it is a Rule 60(b) motion.

15 These findings and recommendations are submitted to the United States District
16 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty
17 days after being served with these findings and recommendations, any party may file written
18 objections with the court and serve a copy on all parties. Such a document should be captioned
19 “Objections to Magistrate Judge’s Findings and Recommendations.” Any reply to the objections
20 shall be served and filed within ten days after service of the objections. The parties are advised
21 that failure to file objections within the specified time may waive the right to appeal the District
22 Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

23 DATED: 3/14/07

/s/ Gregory G. Hollows

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25 GREGORY G. HOLLOWS
UNITED STATES MAGISTRATE JUDGE

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